By Michael J Duffy

Can defendants be forced to disclose their insurance details?

When companies go into liquidation, the obvious targets for litigation – the companies themselves – are impecunious and not worthwhile suing. Others who may be at fault – directors, officers and advisers – may have limited resources, or go bankrupt. The picture is bleak for plaintiffs and their lawyers – unless there is insurance. The problem is, however, that neither plaintiffs or their lawyers may know whether any of these parties are insured. Should they be told? If they are not told, what can they do to force disclosure of insurance? >>

This article briefly reviews some recent cases on the issue of whether a plaintiff can obtain disclosure of insurance policies in or prior to proceedings, through the discovery process or otherwise. As will be seen, the courts seem to be maintaining a relatively tough line against disclosure, except in relation to certain avenues under the *Corporations Act*.

OBTAINING INSURANCE DETAILS – THE RELEVANCE OF PRIVITY

Prior to the commencement of proceedings, a right to access insurance details would be dependent upon a contractual or statutory right. Under existing law, a plaintiff will not be contractually entitled to insurance information in advance of proceedings. The insurance contract is a private contract between the insurer and the insured and, subject to certain exceptions, this will not be available to a third party (even though the third party may claim an interest as a contingent creditor of an impecunious debtor if the latter has a right to claim indemnity under that policy). This is simple privity of contract.[1]

OBTAINING INSURANCE DETAILS BY WAY OF COURT PROCESS

Powers under the *Corporations Act*

There is some authority[2] suggesting that insurance documents may be of legitimate interest in the examination of a person (by an 'eligible applicant') under s596A or 596B of the *Corporations Act* 2001 (Cth). An eligible applicant includes ASIC, a liquidator or an administrator, or a person authorised in writing by ASIC.[3] There would still seem to be a necessity to demonstrate the relevance of the policies to the enquiry, as courts are reluctant to authorise 'fishing expeditions'.

There is also authority (see below[4]) that orders may be made under s247A of the *Corporations Act* 2001 (Cth) for the inspection by a member (shareholder) of insurance policies held by a company. Section 247A relates to the obtaining of orders for inspection by a member of books of a company, or of a registered managed investment scheme.

Discovery

The principle of discovery was described in 1844 by Lord Langdale MR in *Flight v Robinson*.[5]

> 'However disagreeable it may be to make the disclosure, however contrary to his personal interests, however fatal to the claim upon which he may have insisted, [the litigant] is required and compelled, under the most solemn caution, to set forth all he knows, believes, or thinks in relation to the matters in question.'[6]

The general rule used to be that documents will be discoverable by a party if they are relevant to a fact in issue raised by the pleadings. It will be difficult to obtain such documents if they are not relevant to a fact in issue (recoverability of a judgment not usually being a fact in issue raised by the pleadings).[7]

This is still the rule in various state jurisdictions (see below). However, under Rule 2(3) of Order 15 of the Federal Court Rules of Civil Procedure, the documents to be disclosed by way of discovery on notice in civil proceedings in the Federal Court of Australia are even more narrowly defined as:

> 'any of the following documents of which the party giving discovery is, after a reasonable search, aware at the time discovery is given:
> (a) documents on which the party relies; and
> (b) documents that adversely affect the party's own case; and
> (c) documents that adversely affect another party's case; and
> (d) documents that support another party's case.'

This is the modern rule, which was inserted in 1999.[8] Prior to the 1999 changes, the test for relevance of a discoverable document was whether it related 'to any matter in question between the parties'.

Discovery obligations vary in other jurisdictions. In Victoria, discovery can be under a notice for discovery that relates to 'any question raised by the pleadings'.[9] It can also be limited by court order to such documents or classes of document, or to such questions in the proceeding, as the court thinks fit.[10] In NSW, it is made clear that an order for discovery may not be made in respect of a document unless the document is relevant to a fact in issue.[11]

Thus, discovery both pre-trial and during trial, and whether involving parties or non-parties, suffers from the limitation that insurance indemnity is generally not a fact in issue in the proceeding (the power to subpoena is also limited by this requirement). So, Australian courts have generally given a narrow interpretation to deny discovery of insurance documents. In *Beneficial Finance Corporation Ltd v Price Waterhouse*,[12] the Full Court of the Supreme Court of South Australia looked at the issue of discovery of insurance policies. In that case, the plaintiffs sought discovery of a professional indemnity policy, with a view to joining an insurer as a third party and seeking a declaration that it was liable to indemnify the defendant firm of accountants. The court noted that the insurer was not yet a party, and this appeared to make a difference. The insurer had not yet at that time denied indemnity, so that there was therefore no issue between the defendant and its insurer.

Perry J[13] looked at case flow management principles, which had been the subject of some argument in the court below, the possibility of mediation and the need to avoid multiplicity of proceedings, but stated that he was unable to agree that case flow management rules have anything to do with the scope of discovery. In particular, he was unable to accept that the case flow management rules and the interests of securing an expeditious disposal of the proceedings were a warrant for overturning the construction which, over the years, has been placed on long-standing procedures such as the rules as to discovery. Similarly, Landers J[14] indicated that case flow management could not be used for the purpose of making discoverable a document that would otherwise not be discoverable, nor

could it be used for the purpose of justifying the joinder of a party otherwise not susceptible to an order for joinder. The court allowed the appeal, overturning the trial judge's orders for discovery. The plaintiff was therefore not entitled to have discovery and inspection of the details of the defendant's policy of insurance. Special leave to appeal the decision to the High Court was refused on 4 September 1997.

RECENT CASES

The case of *Lopez v Star World Enterprises Pty Ltd*[15] provides some authority for the proposition that the existence of insurance will be relevant to the question of whether a party is entitled to leave to proceed against an insolvent company. In that case, plaintiffs in a representative proceeding sought leave to proceed after the respondent company had been placed in administration, and was in jeopardy of going into liquidation. Olney J held that the question of whether or not any insurance indemnity was available, in the event of liability being established, was an appropriate matter to take into account for the purpose of determining whether or not leave to proceed against the company should be given. In finding that it was in the interests of justice that leave be given to proceed, the court also ordered the respondent company to produce evidence of relevant insurance.[16]

A more recent decision of the District Court of South Australia also considered disclosure of insurance policies, where the insurer was not a party to the proceedings, and found that such policies were available in that case. In *Bennett v WMC (Olympic Dam Corporation) Pty Ltd & Akula Pty Ltd (in liq)* & CGU Insurance Ltd & Ors,[17] the plaintiff brought a claim in negligence for damages for personal injury against the defendant. The defendant claimed an indemnity from both the plaintiff's employer and the employer's insurer. A term of the employer's contract of insurance required the defendant, as a claimant under the policy, to disclose details of other insurances which it held, and there was also a contractual term requiring the maintaining of insurance. There was, therefore, an issue about whether the defendant had procured insurances and, if so, what insurances. Her Honour distinguished *Beneficial Finance* on the basis that any other insurance policies held by the defendant were directly relevant, in the case before her, to an issue arising on the pleadings. She therefore ordered the defendant to discover any insurance policy into which it had entered, which did or might respond to the plaintiff's claim.

Lehmann Bros litigation

Recently, in Australia, in *Wingecarribee Shire Council v Lehman Bros Australia Limited (No. 2)*,[18] a trial judge initially granted an application by the Wingecarribee Shire Council for an order that the administrators of Lehman Bros Australia Limited provide copies of its insurance policies referred to in a report to creditors, as well as directors' and officers' policies in respect of litigation being brought against it by the council. The litigation related to Lehman's marketing to local councils of investments in collateralised debt obligations (CDOs). The council's application relied not on the discovery power, but on the court's powers under s23 of the *Federal Court of Australia Act* 1976 (Cth) to issue an injunction to prevent a defendant from disposing of assets, with a view to frustrating the process of the court, by depriving the plaintiff of the fruits of a judgment in the action (as discussed by Deane J in the High Court in *Jackson v Sterling Industries Ltd*[19]). The trial judge, Rares J, found that it was in the interests of justice that the council have the opportunity of considering Lehman Bros' insurance position before deciding how it should vote on a deed of company arrangement (DOCA).

On appeal, however, the trial judge's decision was reversed. In *Lehman Brothers Australia Limited v Wingecarribee Shire Council*,[20] the Full Court of the Federal Court found that the council had not established an abuse of process by the administrator. The court noted[21] that no application had been made under s440D(1)(b) of the *Corporations Act* for leave to proceed, other than in respect of the application for the production of the insurance documentation; the decision of Olney J in *Lopez v Star World Enterprises Pty Ltd* was therefore not relevant. It also noted[22] that it was not contended that the documents were relevant to any matter in the proceedings, and that the respondents had relied only upon s23 of the *Federal Court of Australia Act* to order the production of the insurance documents (suggesting possibly that the documents may have been >>

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available under the discovery power if relevant to a matter in the proceedings). Because the documents were not sought by discovery, the court also noted that the *Beneficial Finance* case was not relevant.[23]

The Full Court accepted that the court did have power under s23 to prevent litigants from frustrating proceedings, and that this may involve requiring a defendant to disclose information as to its assets, or even freezing those assets. It held, however, that the power was exercisable only if an abuse of process was anticipated. The court considered[24] that the only abuse might be the failure to provide adequate details of the insurance agreements, but that there was no link between that conduct and the feared adverse impact upon the proceedings. It found[25] that there was no evidence to suggest that the draft DOCA was likely to be passed because of the failure by the administrators to provide the information about the respondent's insurance arrangements, and nothing to indicate that the alleged absence of sufficient information had any likely impact on the outcome of that poll. It noted[26] that if the provision of insufficient information by the administrators could constitute an abuse of the processes of the court, the remedy would have been to impede the adoption of the DOCA rather than order production of the insurance documents.

The decision is notable in that it hints at one area where courts have been known to look at a defendant's assets pre-judgment, which is the area of preservation of assets and *Mareva* injunctions.[27] The abuse of process concept appears to be based upon the rationale for equitable relief in the *Mareva* context. This area is notable, as it does form an exception to the general reluctance of courts to be involved in the question of a defendant's assets pre-judgment.[28] That said, the decision went against the plaintiff, and against disclosure on the facts before it.

The *Style* case

In *Merim Pty Ltd v Style Limited*,[29] orders were made under s247A of the *Corporations Act* 2001 (Cth) (the Act), for the inspection of directors and officers' insurance policies held by a company.

Section 247A is about obtaining orders for inspection of the books of a company or of a registered managed investment scheme. It provides that:

> 'On application by a member of a company or registered managed investment scheme, the court may make an order:
> (a) authorising the applicant to inspect books of the company or scheme; or
> (b) authorising another person (whether a member or not) to inspect books of the company or scheme on the applicant's behalf.
> The court may only make the order if it is satisfied that the applicant is acting in good faith and that the inspection is to be made for a proper purpose.'

In a short judgment, Goldberg J found that the term 'books' as used in s247A of the Act included any directors' and officers' insurance policies held by a company. He considered it appropriate, as a matter of exercise of discretion, to order that Style produce for inspection any directors' and officers' insurance policies currently held by Style. The cover granted under any such policies was said to be relevant to the decision to be made by Merim, after inspecting the other documents, whether to apply for leave under s237 of the Act to bring a proceeding on behalf of Style in its name against any directors or officers of Style. The decision thus takes a relatively expansive view of s247A and the general issue of disclosure of insurance. However, it is an interlocutory decision of a single judge. The decision may be partly consistent with the approach in *Lopez*,[30] as it appears to accept that insurance is a relevant factor in determining whether a proceeding should or should not be commenced in the first place. It is also noted that the right provided for under s247A would appear to survive the liquidation of a company, particularly given the liquidator's rights to those books under s530B. In any event, there is also s486 which, in the winding-up context, also provides that the court may make an order for inspection of the books of the company by creditors and contributories, as the court thinks just.

Kirby v Centro Properties

In *Kirby v Centro Properties Ltd*,[31] a class action was commenced by Mr Kirby as a shareholder in Centro Properties Ltd against Centro and other companies, alleging failure to disclose price-sensitive information to himself and to the stock market. The matter was referred to mediation, and an application was brought to produce the insurance policies of the defendants, based on the following arguments:

- A mediation conducted without knowledge of a respondent's insurance cover (if any) would not produce a settlement that could properly be approved under the Act.
- A mediation conducted without knowledge of the respondents' insurance cover would not be consistent with the principles underlying case management, a contention said to engage O72 r7 of the Rules of this Court.
- The insurance policies related to a matter in question in the proceedings and were in the possession, custody and power of the respondents.

Evidence was provided by the solicitor for the plaintiff to the effect that, without insurance policies, it would not be

possible to advise Mr Kirby or to make any recommendation to the court; or for the court to make a determination as to whether any offer of settlement was fair, reasonable and adequate in the interests of the group members as a whole. The case was thus argued essentially upon the 'case management' argument, which had not found favour in *Beneficial*.[32]

Ryan J noted that courts have traditionally been reluctant to accord any relevance to the possession of insurance cover, in determining the existence or measure of liability against which the policy indemnifies a defendant, and that the existence of policies of insurance held by a party or the details of such policies will not normally be relevant to the proof of any cause of action pleaded against that party. He went on to ask whether disclosure of details of a party's insurance can be compelled in aid of mediation of those proceedings. He noted the Queensland decision of *Lampson (Aust) Pty Ltd v Ahden Engineering (Aust) Pty Ltd* [1999] 2 Qd R 252, as illustrating a requirement to disclose before a mediation. However, he found that that decision was based on the then peculiar wording of the Queensland rules.

His Honour did not accept that a lack of knowledge by the applicant and his advisers of the existence and extent of insurance cover held by the respondents would, at this early stage, preclude the applicant's advisers from forming, pursuant to s33V of the *Federal Court of Australia Act*,[33] an opinion on the reasonableness of any proposed outcome of negotiations in a mediation. Nor did he accept that a mediation occurring in the absence of that knowledge would be 'hollow' or inconsistent with the principles that the court had developed for the mediation or case management of disputes like the present.

Finally, he found that documents relating to insurance cover were not documents 'relating to matters in question' in the proceeding.

Snelgrove v Great Southern Managers Australia Ltd

The most recent relevant decision suggests a more permissive approach to disclosure of insurance, by reference again to case management principles. In *Snelgrove v Great Southern Managers Australia Ltd (in liq) (Receivers and Managers appointed)*,[34] the plaintiff sought both leave to commence proceedings against a company in liquidation under s471B of the *Corporations Act* and an order authorising the inspection of books (including insurance policies) under s247A of that Act. The decision, therefore, covered some of the same ground as the decisions in *Lopez* and in *Style*. Le Miere J of the Supreme Court of Western Australia granted leave to proceed. He noted the opinion of Newnes J in *Lawless v MacKendrick [No. 2]*[35] that where there is an insurance company standing behind the company to pay any judgment that the plaintiff may obtain, that is a factor strongly favouring the granting of leave.

His Honour also reviewed the cases in which inspection had been sought of books as to the issue of proper purposes and concluded (at para [67]) that:

> 'The purpose of the plaintiffs in seeking access to the relevant insurance policies is to assist them in considering the economic viability of pursuing their proposed action against the company. That is a proper purpose.'

He concluded (at para [68]):

> 'The nature and extent of the company's insurance cover is not in itself a matter in dispute in the action which the plaintiffs are contemplating commencing against the company. However, that is not a condition for the exercise of the power under s247A. The disclosure of the existence and extent of the relevant insurance cover is likely to assist the plaintiffs in determining whether or not to commence or proceed with the proposed action. If the company does not have insurance which covers the plaintiffs' claims, or the quantum of the cover is such that it is likely to be substantially exhausted in legal costs, then the plaintiffs may well not proceed with the proposed action. That would prevent the resources of the parties and public resources being wasted. The thrust of the approach to litigation enshrined in the case management rules of this court and other superior courts in Australia is to avoid waste of time and cost and to ensure, as far as possible, proportionate and economical litigation. It is an appropriate exercise of the discretion of the court to make an order granting access to the plaintiffs to the company's relevant insurance policies.'

The *Snelgrove* decision thus seems to effect a re-emergence of the case management argument that was disposed of 14 years earlier in *Beneficial*. >>

Courts have traditionally been reluctant to accord any relevance to the possession of insurance cover when deciding the existence or measure of liability against which the policy indemnifies a defendant; and a party's insurance policies are not normally relevant to the proof of any cause of action pleaded against that party.

CONCLUSION

Production of insurance policies has been sought on a number of different bases. Except for the possible exception of obtaining 'books' under s247A of the *Corporations Act* and possibly on an application for leave to proceed against an insolvent company, current Australian law does not suggest that a plaintiff has any right to obtain disclosure of a defendant's insurance policies prior to the filing of proceedings. This appears to be so, notwithstanding rights to preliminary discovery or discovery from non-parties, as it will generally be difficult for a plaintiff or a defendant to argue that he or she has any likely right of action against an insurer before proceedings have even been commenced against an insured defendant. This is so even having regard to certain statutory and other rights that might ultimately allow a plaintiff to join an insurer as defendant to a proceeding.

Once a proceeding has been commenced, however, the right to discovery of the policy will generally depend upon whether the existence and nature of insurance is a 'fact in issue' raised by the pleadings (though the enquiry may be more limited under the Federal Court Rules as to discovery). This, in turn, may depend upon whether the insurer is a party, and whether there is an issue arising over the indemnity. If the insurer is not a party, then the policy is unlikely to be relevant to a fact in issue, unless the obtaining of or failure to obtain adequate insurance is itself a fact in issue, giving a right to relief against a defendant in the proceeding (including perhaps a right against a person who was knowingly involved in a failure by a company adequately to insure, contrary to a lawful requirement to do so). Nor does there appear to be a general right to inspection or production of insurance policies pursuant to rights to preserve assets pending trial. ■

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Notes: **1** There is, of course, the possibility that the insured is the agent of the third party for whose benefit the insurance contract is made or that the insured was a trustee of the benefits of the policy for the third party. **2** *Gerah Imports Pty Ltd v The Duke Group Ltd (in liq)* (1993) 61 SASR 557. **3** Section 9 *Corporations Act* 2001 (Cth). **4** *Merim Pty Ltd v Style Limited* (2009) 255 ALR 63; *Snelgrove v Great Southern Managers Australia Ltd (in liq) (Receivers and Managers appointed.* [2010] WASC 51. **5** (1844) LJ Ch 425; 50 ER 9. **6** *Ibid.* **7** See, generally Philip Greenwood and Paul O'Brien, 'Issues for insurers in the discovery process' (1998) 9 *Insurance Law Journal* 1. **8** By SR No 295 of 1999, Sch 1, effective 3 December 1999. **9** Order 29.02 *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). **10** Order 29.07 *Supreme Court (General Civil Procedure) Rules* 2005 (Vic). **11** Regulation 21.1 *Uniform Civil Procedure Rules* 2005 (NSW). **12** (1996) 68 SASR 19 ('*Beneficial*'). **13** *Ibid,* at para 67. **14** *Ibid,* at para 225. **15** [1997] FCA 454 (unreported, 18 April 1997) (*Lopez*). **16** To somewhat similar effect was *Company Solutions (Aust) Pty Ltd v Keppel Cairncross Shipyard Ltd (in liq)* [2004] QSC 379 (unreported Douglas J, 29 October 2004), where liquidators of the respondent were required to provide discovery of the policy of insurance held by the liquidators. Here, the practical issue was whether the third-party claim advanced against the respondent should proceed in light of its obvious insolvency. Douglas J stated that the document was a relevant document, notwithstanding the need to identify direct relevance under the Queensland rules of discovery. Other decisions suggesting that insurance is relevant to a leave to proceed application are *Glaister v Banwell Pty Ltd* [2003] WASC 101 (unreported Sanderson J, 27 May 2003), *Re Gordon Grant & Grant Pty Ltd* (1982) 1 ACLC 196, 199; *Pace Tasmania Pty Ltd (in liq) v FAI General Insurance Co Ltd* (2001) 10 Tas R 276, *Done v Financial Wisdom Limited* [2008] FCA 1706 (unreported, Perram J, 14 November 2008). **17** [2008] SADC 42. **18** (2009) 72 ACSR 38; [2009] FCA 532. **19** (1987) 162 CLR 612 [at 622-3]. **20** [2009] FCAFC 63 (2009) 176 FCR; (2009) 72 ACSR 251. **21** *Ibid,* at para 35. **22** *Ibid,* at para 34. **23** *Ibid,* at para 36. **24** *Ibid,* at para 50. **25** *Ibid,* at para 54. **26** *Ibid,* at para 58. **27** See *Mareva Compania Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep. 509 (*Mareva*). *Mareva* generally stands for the principle that court may grant an order to freeze assets before judgment, so that a defendant cannot dissipate their assets from beyond the jurisdiction of a court so as to frustrate a judgment. It was a significant departure from the well-established principle that equity would not inhibit a debtor's dealings with his property before a judgment justified execution orders against that property (although this was not the case if the plaintiff had a legal or equitable interest in the property itself: see *Lister v Stubbs* (1890) 45 ChD 1). **28** The *Mareva* doctrine applies to assets that are put in jeopardy or outside the jurisdiction. It might be applicable, for instance, where a defendant takes action during a proceeding to prejudice its insurance position. Likewise, a defendant who took action to prejudice their position or conceal the existence of insurance (such as by threatening to destroy an insurance policy) might arguably be subject to the doctrine (of course a defendant is generally unlikely to do these things as they may prejudice the defendant's own position). A defendant that is merely silent as to the existence of insurance and in the absence of any obligation to do so does not produce any insurance documentation is probably in a different situation, and it would strain the *Mareva* doctrine to call this an abuse of process. **29** (2009) 255 ALR 63 (*Style*). **30** [1997] FCA 454 (unreported, 18 April 1997). **31** [2009] FCA 695 (unreported 26 June 2009) (*Kirby*). **32** (1996) 68 SASR 19. **33** 1976 (Cth). Which requires court approval of any settlement of a representative proceeding (class action). **34** [2010] WASC 51 (*Snelgrove*). **35** [2008] WASC 15 at para [47]. He also noted other authorities cited in support of this proposition being *Foxcroft v Inc Group Pty Ltd* (1994) 15 ACSR 203, 205; *Aquila Resources Ltd v Pasminco Ltd* [2002] WASC 53; (2002) 168 FLR 85, 87 [6] - [7] and *Lawrence v Brighton Hall Securities Pty Ltd* (in liq) [2009]FCA 1425.

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